Supreme Court, U. S.
FILED
APR 11 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1448

ROOSEVELT THOMAS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

JERROLD M. LADAR,
507 Polk Street, Suite 310,
San Francisco, California 94102,
Telephone: (415) 928-2333,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Questions presented for review	2
Constitutional provision involved	2
Statement of the case	3
Reasons for granting the writ	6
1. The Ninth Circuit failed to apply the rule enunciated by this Court in United States v. Chadwick, ... U.S. ....., 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977)	6
2. The Ninth Circuit failed to apply the rule enunciated by this Court in Henry v. United States, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959)	7
Conclusion	8

Table of Authorities Cited

Cases	Pages
Henry v. United States, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959)	2, 7, 8
United States v. Chadwick, ... U.S. ....., 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977)	2, 6, 7, 8

Statutes

21 U.S.C.:	
Section 841(a)(1)	2
Section 846	2
28 U.S.C., Section 1254(1)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No.

ROOSEVELT THOMAS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

The Petitioner, Roosevelt Thomas, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 15, 1978.

OPINION BELOW

On March 15, 1978 the Court of Appeals entered Memorandum affirming the conviction of Petitioner.

A copy of the Memorandum, which is not to be reported officially, is attached as Appendix A.

JURISDICTION

On March 15, 1978 the Court of Appeals entered judgment affirming the convictions of Petitioner for conspiracy to possess heroin with intent to distribute and possession of heroin with intent to distribute, both in violation of 21 U.S.C. §§ 841(a)(1) and 846. [App. A] Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless search of a bag seized from a locked trunk of an automobile constitutes an illegal search under this Court's decision in *United States v. Chadwick,* ..... U.S. ....., 53 L.Ed.2d 538 97 S.Ct. 2476 (1977).

2. Whether the law enforcement officers stopping a vehicle and demanding that the occupants exit the vehicle for questioning constitutes an arrest under this Court's decision in *Henry v. United States,* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959).

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was charged in a two-count indictment, together with one Ernest Slocum (alias Bernard Howard Robinson) with conspiracy to possess heroin with intent to distribute and possession of heroin with intent to distribute. [C.R. 1-2][1] He waived jury and was tried by the United States District Court for the Southern District of California. [C.R. 32] A motion to suppress, made prior to trial, was denied. His motion for judgment of acquittal was denied. [Vol. II R.T. 56][2] The trial judge found him guilty on both counts (II R.T. 62, C.R. 1-2). In February of 1977, DEA Agent Micheal Groseclose received information that Petitioner was in the El Centro, California area and that he was registered at the El Dorado Motel and had listed a 1964 Ford, California license 207AWE, which vehicle had figured in the investigation of Petitioner's January visit to the El Centro area. [R.T. 9-10] A surveillance was set up on the motel room. [R.T. 10] Petitioner was observed leaving the motel and driving to a pay telephone more than a mile from the motel. Petitioner then returned

---

[1] "C.R." refers to the Clerk's Record.

[2] "Vol. II R.T." refers to the Reporter's Transcript, Volume II.

to the motel room and within five minutes emerged and drove to an El Centro shopping center where he entered a K-Mart Store. [R.T. 10-11] After departing the K-Mart Store, Petitioner drove south on Imperial to a drug store. He sat in his vehicle for a short time then entered the drug store briefly. Reentering his vehicle, he drove back to the motel. [R.T. 11-14]

Thereafter, Slocum and Petitioner checked out of the motel and drove east on Interstate 8 with Slocum driving at approximately 40 miles per hour. [R.T. 13] The 1964 Ford containing Petitioner and Slocum continued east on Interstate 8 to Yuma, Arizona, with the vehicle stopping at a Texaco gas station parking lot for about fifteen minutes and an additional stop in a rest area approximately twelve miles west of Yuma. [R.T. 14-16]

When they stopped in Yuma, Slocum and Petitioner remained in a park for about one-half hour before driving to a Yuma shopping center where Petitioner entered a Fed Mart and came out holding a brown paper bag in his hand. [R.T. 15-18] They then drove to another Yuma shopping center where Petitioner visited several stores briefly. After approximately forty-five minutes they drove back to the Fed Mart parking lot where they parked next to a vehicle with Mexican license plates. DEA Agent Luke observed a Mexican male approximately ten feet from the 1964 Ford who was walking away from the area of the Ford. No conversation or exchange between the Mexican and the occupants of the Ford was observed by

the surveilling DEA Agents and the Mexican male who walked toward the main parking lot of the stores was not followed. [R.T. 19, 58-59] Shortly thereafter, the Ford drove out of the area to Interstate 8 and proceeded westbound to El Centro, California. [R.T. 59-60]

When the Ford arrived in El Centro, Slocum parked in a hospital parking lot while Petitioner exited the rear of the Ford with a pink paper bag which he placed in the trunk compartment of the Ford. The vehicle containing Slocum and Petitioner then proceeded north on Highway 86 through Brawley and Westmoreland, California where four DEA vehicles stopped it with four DEA Agents approaching the Ford and ordered Petitioner and Slocum to get out of the Ford and stand to the rear of the Ford. [R.T. 21-22, 59-63]

The DEA Agents testified that Petitioner and Slocum gave permission for the Agents to search the Ford but that testimony was disputed by Petitioner and Slocum. DEA Agent Groseclose, assisted by DEA Agent Pulley, searched the interior of the Ford. Agent Pulley discovered a small film canister which he opened and detected an odor "like heroin or acetic acid." Agent Pulley also discovered some brown powder in the crack of the front seat which powder appeared to Agent Groseclose to be heroin. Groseclose then advised Petitioner and Slocum that they were under arrest. Agent Pulley obtained the trunk key, opened the trunk compartment of the Ford and Agent Luke removed the pink bag from the trunk. The bag

was found to contain approximately 868 grams of heroin. [R.T. 22-26, 68, 76, 89-93, 98-100] No arrest or search warrant was obtained.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT FAILED TO APPLY THE RULE ENUNCIATED BY THIS COURT IN UNITED STATES v. CHADWICK, ... U.S. ...., 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977).

In *United States v. Chadwick,* ..... U.S. ....., 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977) this Court held that the fact that a footlocker was seized while located within an automobile does not mean that the warrant requirement of the Fourth Amendment is inapplicable to the search and seizure of that footlocker. This Court's opinion was based on its finding that the expectation of privacy in luggage was greater than the expectation of privacy concerning automobiles.

> "The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.,* at 549.

In the Ninth Circuit opinion in the case at hand, a bag was seized from the locked trunk of the car that

Petitioner was in at the time he was arrested. The bag was searched without a warrant at a time when the bag was not within the control of Petitioner or Mr. Slocum.

Thus the Ninth Circuit had before it a case in which *Chadwick* should have been applied; however, in its opinion, the Ninth Circuit did not apply *Chadwick* nor was that case, or the point of law enunciated therein, ever mentioned.

---

2. THE NINTH CIRCUIT FAILED TO APPLY THE RULE ENUNCIATED BY THIS COURT IN HENRY v. UNITED STATES, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959).

In *Henry v. United States,* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959) this Court held that an "arrest" takes place when law enforcement officers stop a vehicle and restrict the liberty of movement of the occupants.

In the case at hand Petitioner and Slocum, while driving in the vehicle, were stopped along the side of the highway by government agents who approached the vehicle and ordered Petitioner and Slocum to exit the vehicle for questioning. Petitioner contended on appeal that at that point an arrest had taken place and that the arrest was not supported by probable cause. The Ninth Circuit held, without citing authority, that no arrest had taken place "where the agents approached the car without weapons drawn and asked defendants to step to the rear of the car to answer some questions". Thus, the Ninth Circuit failed to

apply the rule in *Henry, id.*, which if it had been applied would have led the Ninth Circuit to hold that an arrest had occurred which Petitioner argued was not supported by probable cause, thus rendering illegal the subsequent consent search.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit to apply the case at hand the rules enunciated in *United States v. Chadwick, supra,* and *Henry v. United States, supra.*

Respectfully submitted,

JERROLD M. LADAR,
507 Polk Street, Suite 310,
San Francisco, California 94102,
Telephone: (415) 928-2333,
Attorney for Petitioner.

Dated, April 10, 1978.

(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellee, vs. Ernest Morris Slocum, Appellant.	No. 77-2745
United States of America, Appellee, vs. Roosevelt Thomas, Appellant.	No. 77-2784

[Filed Mar. 15, 1978]

Appeal from the United States District Court
for the Southern District of California

MEMORANDUM

Before: GOODWIN, WALLACE, and HUG, Circuit Judges.

Ernest Slocum and Roosevelt Thomas were charged with conspiracy to possess and possession of heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846, after law enforcement officers found approximately 868 grams of heroin in the car in which Slocum and Thomas were driving. Both men waived their right to a jury trial after the court denied their motions to suppress the heroin seized. The court found Slocum guilty of conspiracy and not

guilty of possession. The court found Thomas guilty of both conspiracy and possession.

Slocum and Thomas, on appeal, both argue that the trial court erred in denying their motions to suppress. In addition, each defendant individually asserts that there was insufficient evidence to sustain his conviction. We will discuss each of these contentions separately after a review of the relevant facts.

In February of 1977, DEA Agent Michael Groseclose received information from a confidential informant that Thomas was in El Centro, California. Agent Groseclose had investigated Thomas in January of that year after customs officers reported that Thomas had come through the border port of entry and had commented to the customs inspectors that he would give them the name of the motel at which he was staying in El Centro so that they would not have to follow him. Agent Groseclose discovered in January that Thomas had been in the El Centro area twice in the previous two months. During this investigation the agent also found that DEA files contained a witness's statement that named Thomas as the recipient of large monthly shipments of heroin from Mexico in 1975. A check of Thomas's phone bills revealed calls from his phone to the numbers of known heroin traffickers in several cities across the country.

When Agent Groseclose learned that Thomas was in El Centro again, he set up surveillance of Thomas's motel room. Thomas was sharing a room with a man using the name Bernard Robinson. This "Robinson" was later identified as Ernest Slocum. The motel rec-

ords showed that a Bernard Robinson had registered at the motel a month before and, at that time, had received calls from Thomas's phone number in Oakland, California.

On the morning of February 27, 1977, agents saw Thomas leave his motel room and drive to a pay phone a short distance from the motel. Thomas used the pay phone although there was a phone in his motel room and public telephone booths at the motel. Thomas then returned to his motel room.

Later that morning Thomas and Slocum checked out of the motel. Agents followed the two men east on Interstate 8 at approximately 40 miles per hour in a 50 mile per hour speed limit area. Slocum was driving. The agents followed Thomas and Slocum for 60 miles to Yuma, Arizona. Twice during this trip Slocum pulled off the freeway at rest stops and parked in a place that enabled the occupants of the car to watch eastbound traffic on the freeway. Once in Yuma, the agents observed the two men take a circuitous route through a residential area and stop for several minutes at a city park. The agents then saw the men drive to a shopping center where Thomas left the car for a few minutes and went in and out of several stores, spending only a few seconds in each one.

The agents then followed Slocum and Thomas to the parking lot of a nearby store. Slocum parked the car behind the store next to a car with Mexican plates. As one of the agents rounded a corner to get a better view, he saw a male Mexican, approximately ten feet from the two cars, walking away from the cars. Slo-

cum and Thomas did not get out of the car, and a few minutes later they drove back to the freeway and began traveling west toward El Centro. During the trip back to El Centro, Slocum drove at the speed limit and Thomas rode slouched down in the back seat.

Slocum pulled off the freeway in El Centro. Agents saw Thomas get out of the car carrying a pink paper bag and place the bag in the trunk. Thomas then got into the front seat and the two men drove north out of El Centro.

Agent Groseclose interpreted the driving pattern and behavior of the defendants as evasive tactics aimed at avoiding government surveillance. When Agent Groseclose determined that the defendants were leaving the border area, he turned on his red light and siren and pulled the defendants off to the side of the road. He saw Thomas making a motion in the middle of the front seat after the red light and siren were turned on. Agents in three other marked government cars participated in the stop.

The agents identified themselves and told Slocum and Thomas that they were investigating possible smuggling of narcotics. Both Slocum and Thomas consented to a search of the car. In the middle of the front seat, the agents found a small, empty film canister which smelled like heroin and some brown powder which later proved to be heroin in the crack between the base and the back rest of the front seat. After these items were found, the agents placed Slocum and Thomas under arrest. A subsequent search of the

trunk revealed a pink paper bag containing two packages of heroin.

The trial judge found that the defendants' actions gave the agents founded suspicion sufficient to justify an investigatory stop of the defendants' car. We agree. *See United States v. Bates,* 533 F.2d 466, 469 (9th Cir. 1976). *Cf. United States v. Chatman,* slip op. (9th Cir. Dec. 1, 1977).

Slocum and Thomas argue that the stop of the car constituted an arrest because of the agents' conduct. Viewing the evidence in the light most favorable to the government, we must disagree. Although four agents and four government vehicles were involved in the stop, the conduct of the agents did not constitute an arrest where the agents approached the car without weapons drawn and asked the defendants to step to the rear of the car to answer some questions.

The trial judge found that the defendants voluntarily consented to a search of the car after the initial stop. An appellate court must review such a finding by the "clearly erroneous" standard. *United States v. Lemon,* 550 F.2d 467 (9th Cir. 1977). We cannot say that the trial court's finding in this case was clearly erroneous. The heroin found after the defendants consented to a search gave the agents probable cause to arrest them. The defendants' motions to suppress were properly denied.

Both Thomas and Slocum argue that there was insufficient evidence to sustain their convictions. The proper test in determining the sufficiency of the evidence is whether the evidence, considered in a light

favorable to the government, permits a rational conclusion by the trier of fact that the accused was guilty beyond a reasonable doubt. *United States v. Jones,* 518 F.2d 64, 65 (9th Cir. 1975).

Slocum concedes that he drove a car that contained heroin but argues that the prosecution failed to prove that he knew that the heroin was in the car. On this point, the trier of fact is entitled to consider the manner in which Slocum was driving. Moreover, in prior cases the inference has been permitted that the drivers of vehicles have knowledge of the presence of contraband in the trunk of the vehicle they have been driving. *See United States v. Jones,* 518 F.2d at 68; *United States v. Martinez,* 514 F.2d 334, 338 (9th Cir. 1975). In the context of vehicles returning from Mexico, we have held that knowledge of the presence of contraband in a vehicle may be inferred as to all occupants of the vehicle where the trip was a joint venture. *United States v. Martinez,* 514 F.2d at 340.

The evidence in the instant case is sufficient to sustain Slocum's conviction. The fact that he was acquitted on a substantive possession count which was based on the same facts as the conspiracy count is irrelevant to our review of his conviction. Where verdicts or findings are returned under a multiple-count indictment, the verdicts or findings on different counts of the indictment need not be consistent. *McElheny v. United States,* 146 F.2d 932, 933 (9th Cir. 1944).

There was sufficient evidence to sustain Thomas's convictions.

Affirmed.